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IN THE

Supreme Court of the United States

SENATOR MITCH McCONNELL, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF COMMUNITY ORGANIZATIONS DEDICATED TO DEFENDING THE CIVIL RIGHTS OF RACIAL MINORITIES, AS *AMICI CURIAE* IN SUPPORT OF THE APPELLEES

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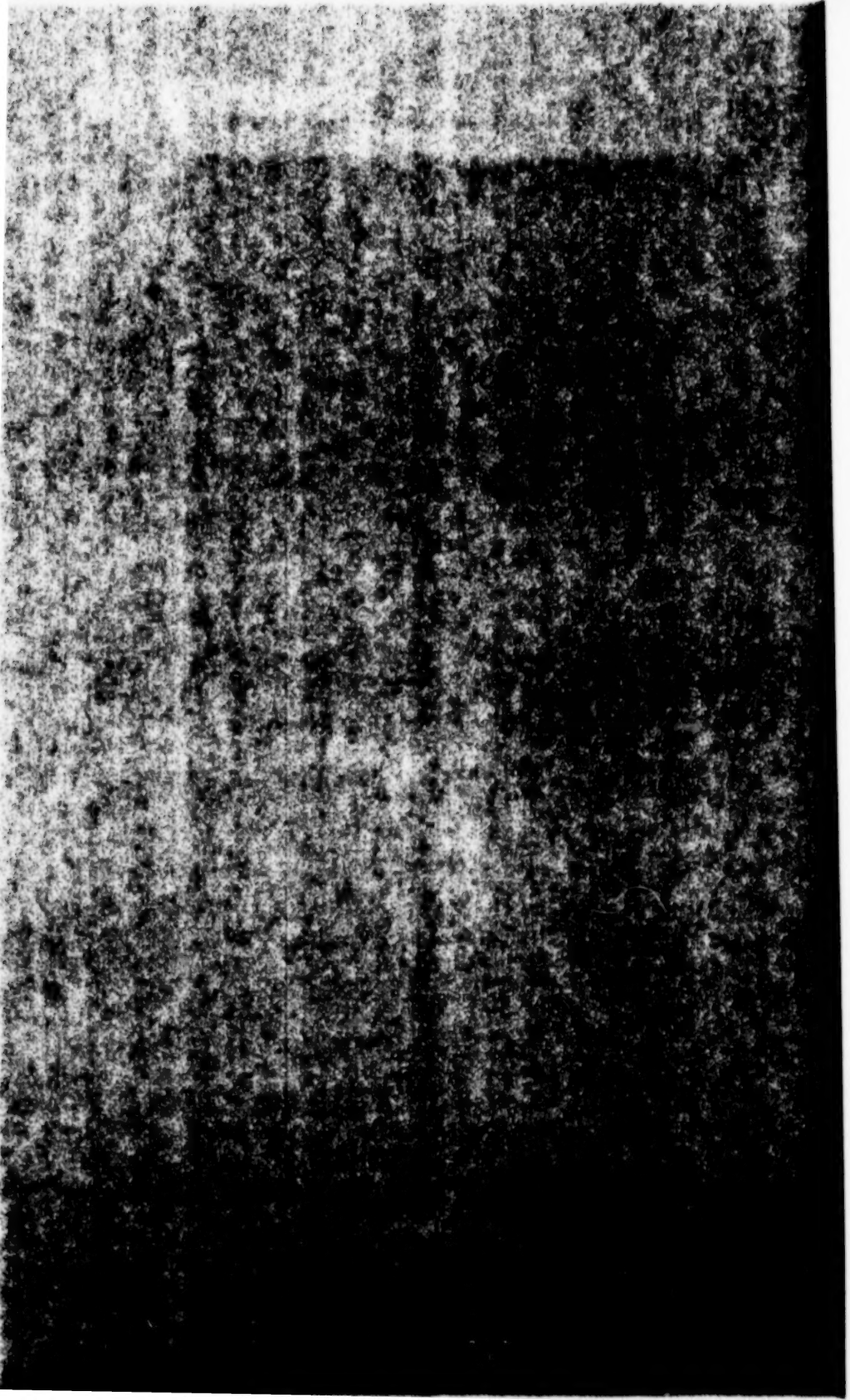

This brief is filed on behalf of the following community organizations dedicated to defending the civil rights of racial minorities:

Allen Temple Baptist Church
American GI Forum
El Concilio of San Mateo County
First AME Church, Los Angeles
Greater Phoenix Urban League
Hermandad Mexicana Nacional
Hmong American Political Association
Latin Business Association
Latino Issues Forum
Mexican American Political Association
Mission Language & Vocational School
National Black Business Council, Inc.
National Council of Asian American Business Associations
National Federation of Filipino American Associations
Oakland Citizens Committee for Urban Renewal
San Francisco Black Chamber of Commerce
Southeast Asian Community Center
The California Black Chamber of Commerce
The Chicano Federation of San Diego County, Inc.
The East Los Angeles Community Union
The Greenlining Institute

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

In an ideal world, men and women of perfect virtue, vision and diversity are elected to public office. They enact laws and approve policies for the greater good, unaffected by the special interests and persistent urgings of their most generous contributors. They steadfastly refuse to compromise beliefs, analyses or principles for reelection, their next targeted higher public office, or their own ultimate financial well-being. And, campaigns for office in that ideal world wouldn't cost tens or hundreds of millions of dollars of privately raised funds.

Few issues engender as much fire and energy as "campaign finance reform." And that's because in the real world it really matters. It matters to incumbents, to their potential challengers, to vested interests and to citizens, including the communities of color sponsoring this brief, who have been effectively shut out of meaningful participation in our political process. It matters because the massive amount of money contributed to finance campaigns in America has an undeniable and monumental impact on who gets elected,[2] who gets access to and heard by those who are

1. Pursuant to Supreme Court Rule 37.3(a), *Amici* filed this brief with the written consent of all parties. Pursuant to Rule 37.6, *Amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission.

2. Despite the fact that racial minorities are approximately 30% of the United States population, there are currently no Black or Latino United States Senators and only approximately 16% of United States Representatives are people of color.

elected, and on the ultimate decisions about health care, wages, taxes, quality of schools, public benefits, affirmative action, neighborhood safety, the environment and equal justice.

The corruptive and pervasive role of soft money political contributions is outlined in many publications and studies and in the legislative history; these are in the record and need no repetition here. Between January 1995 and December 2002, the Republican and Democratic parties raised nearly 1.3 *billion* dollars in soft money. Soft money constituted 41% of all funds expended by the two parties in the 2000 election cycle. The vast majority of money came from big business interests. Congress and the President have intervened. They took a first step in enacting the Bipartisan Campaign Reform Act of 2002 ("BCRA" or "Act"). While no one, sponsors or opponents, suggests that the Act solves all problems, *Amici* are convinced that its restrictions on soft money must be preserved.[3]

Amici are organizations dedicated to improving the quality of life for low-income and Asian-American/Pacific Island, Black, and Latino communities. *Amici* represent communities of color with the highest levels of poverty, environmental pollutants, infant mortality and crime, as well as the lowest levels of employment, educational achievement and home ownership. While *Amici* represent diverse constituencies, including community-based organizations of color, faith-based organizations, minority business chambers

3. While hard money contributions to candidates, parties and political action committees are subject to prescribed limits, and corporations and unions are barred from such contributions, under the pre-BCRA campaign finance regime, there was *no limit* on soft money contributions to national party committees.

and community development corporations, they are united by a civil rights issue affecting each of their communities: campaign finance reform.

Amici are committed to eradicating the soft money system that displaced the American promise of "one person, one vote" with the corrosive reality of a "pay to play" scheme. *Amici* are deeply interested in ensuring that communities of color can participate fully in the political process. *Amici* believe that the soft money reform in BCRA is an important, indeed critical, change, that will help open the process for presentation of their issues to an audience of elected officials who will be responsive to their concerns.

ARGUMENT

I.

CAMPAIGN FINANCING IS A CIVIL RIGHTS ISSUE.

In 1965, Congress enacted the Voting Rights Act in response to "an upsurge of public indignation against the systemic exclusion of Negroes." H.R. REP. No. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. 2437, 2440. Prior to passage of the Act, Congress conducted lengthy hearings in which it heard from a wide variety of concerned officials and individuals. In its General Statement in support of the Act, a group of Republican Congressmen commented, "[t]he problem to which this legislation is directed is no abstract matter to those whose rights must be assured. The right to vote is of particular importance and value to minority groups

in general but to our Negro citizens in particular who suffer deprivations of rights other than access to the ballot." *Id.* at 2465-66 (General Statement of Republican Views).

Even as it enacted major reform, Congress predicted that given the tenacity of racial discrimination, new forms of voter discrimination would replace the existing ones:

> As we destroy the traditional bastions of discrimination erected at registration and polling places, we must foresee the path of retreat and reentrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely it will be in the form of fraud, intimidation and corruption. . . .
>
> It is a cruel deception to give any man the elective franchise and then allow destruction of the effect of his vote through a multitude of corrupt practices. (*Id.* at 2471)

The corruption predicted in 1965, of course, was of the more virulent variety than exists today—ballot stuffing and coercion of voters. But, there are other types of unfair influence that now beset our political system and shut out those most in need of representation. Today, it is the power of moneyed interests that dominates the agenda of the nation's leaders and undermines representative democracy. Forty years after it passed the Voting Rights Act, Congress again responded to "an upsurge of public indignation," and enacted the Bipartisan Campaign Reform Act of 2002.

As demonstrated by *Amici* below, the campaign finance system has excluded the least affluent citizens, many of whom are racial minorities. The pre-Act campaign finance regime, with its emphasis on unrestricted funds, has profoundly unbalanced our electoral system and deprived minorities of an effective voice in the direction of their country. As this Court has most recently affirmed in the analogous context of affirmative action, it is only by recognizing and addressing the persisting symptoms of past racial discrimination that our Nation can realize "the dream of one Nation, indivisible." *Grutter v. Bollinger*, 156 L. Ed. 2d 304, 2003 U.S. LEXIS 4800, at **44 (June 23, 2003).

In *Grutter*, this Court recognized a university's compelling need to intervene and to correct the effects of discrimination at the level of college and graduate school admissions because such institutions are the gateways to leadership. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at **45. Having held that the Constitution is no bar to affirmative action in university admissions, this Court now has an opportunity to clear an even greater hurdle to fair representation by upholding the right of the Legislative and Executive Branches to pass tailored campaign finance reforms to the process for selecting and electing our future leaders.

II.

RACIAL MINORITIES ARE UNIQUELY DISADVANTAGED BY THE PRE-BCRA CAMPAIGN FINANCE SYSTEM.

A. Racial Minorities Are Unable To Participate Meaningfully In Campaign Financing.

Public Campaign, a nonpartisan public interest organization, studied campaign contributions made during the 1995-96 federal election cycle with respect to race.[4] That published study entitled, *The Color of Money*, correlated United States Census data and zip code data from federal campaign reports and concluded that "people of color, in general, are politically disenfranchised." PUBLIC CAMPAIGN, THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE (1998).[5] Findings include:

4. Public Campaign's National Advisory Board includes officials from both parties and from bipartisan lobbying groups, including among others: Mary Dent Crisp, former Co-Chair, Republican National Committee; Steve Grossman, former National Chairman, Democratic National Committee; Carolyn Jefferson Jenkins, President, League of Women Voters of the United States; James Abourezk, former United States Senator (D-SD); Thomas Eagleton, former United States Senator (D-MO); Robert Stafford, former United States Senator (R-VT); William Proxmire, former United States Senator (D-WI); and Paul Simon, former United States Senator (D-IL).

5. *Available at* www.colorofmoney.org. (For the convenience of the Court, we include the websites of the studies and articles cited herein that are available online.)

1. The 26 zip codes that provided the most money had a population of just under 700,000. That group contributed about $67 million dollars. That was *about the same amount* as contributed by *all* 2,492 zip codes in which people of color comprise 50% or more of the population—$66 million. The combined population of the 2,492 zip codes is *over 41 million persons* or 60 times greater than the population in the other 26 zip codes.

2. The average contribution from the 100 top-giving zip codes was 210 times higher than the average amount from the 100 zip codes with the highest percentage of minorities: $1.5 million compared to $7,000. The participation rate was 100 times greater in the 100 top-giving zip codes—three of 100 citizens contributed compared to three of 10,000 in the largely minority zip codes.

3. There are 483 zip codes in the United States in which people of color comprise 90% or more of the population. The average contribution in those zip codes was $.59 per person. This contrasts with the average of $65 per person in the 100 highest-giving zip code areas.

A study by professors and doctoral students at the University of Maryland, the University of Akron and Georgetown University surveyed a random sample of donors reported to the Federal Election Commission ("FEC") as having given at least $200. John Green et al., *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded*, JOYCE FOUNDATION (1998).[6] The study also identified an additional list of "most active donors"—donors who gave money to at least eight

6. *Available at* www.opensecrets.org/pubs.

candidates and/or gave at least $8,000. John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 PUBLIC PERSPECTIVE 29 (2000).[7] The researchers concluded that "donors to House and Senate candidates are disproportionately drawn from advantaged social and economic groups." *Id.* at 30. Nearly 80% of donors had incomes of over $100,000 and over 80% were college graduates. Among the most active donors, over half had incomes of over $500,000 and only four percent had incomes of less than $100,000. However, the single most common characteristic among donors—regardless of whether they were regular donors or the most active—was race: 99% of the donors were white. *Id.*

It is lack of money, not lack of interest, that creates the disparity in political contributions. Minorities simply have less wealth and less income than Whites. In 1998, the median net worth was $9,200 for Latino households, $15,000 for Black households, and $95,610 for White households. CENSUS INFORMATION CENTER, NATIONAL COUNCIL OF LA RAZA, *Hispanic Savings and Individual Development Accounts (IDAs) Fact Sheet* at 1 (Nov. 2000)[8] (based on findings by the Federal Reserve).[9] In 2001, the median household income for White non-Hispanic households was $46,305, for Black households

7. *Available at* www.georgetown.edu/faculty/wilcoxc/joyce.htm.

8. *Available at* www.nclr.org/policy/econ.html.

9. These numbers are consistent with data compiled by the United States Census Bureau. In 1995, the median net worth was $49,030 for Whites, $7,073 for Blacks, and $7,255 for Latinos. U.S. CENSUS BUREAU, HOUSEHOLD NET WORTH AND ASSET OWNERSHIP: 1995, at xv (2001).

$29,470, and for Hispanic households $33,565; in other words, the median income for a Black or Latino household was about one-third lower than the median income for a White household. U.S. CENSUS BUREAU, TABLE HINC-03. PEOPLE IN HOUSEHOLDS—HOUSEHOLDS, BY TOTAL MONEY INCOME IN 2001: AGE, RACE, AND HISPANIC ORIGIN OF HOUSEHOLDER (2002).[10]

In a landmark study, the "Citizen Participation Study" by Sidney Verba, Kay Lehman Schlozman and Henry Brady, the authors conducted a scientific large-scale, two-stage survey of the voluntary activity of the American public (political, charitable and religious). The first stage was a random telephone survey of 15,000, including 1,400 African-American and 894 Latino respondents. This stage was followed by in-person interviews of 2,517 of the original 15,000, with a weighted sample including 477 African-Americans and 370 Latinos. Henry E. Brady et al., *Race, Ethnicity, and Political Participation in* CLASSIFYING BY RACE 354, 355-56 (Paul E. Peterson ed., 1995). They concluded, "[t]he results are unambiguous: the major determinant of giving money is having money." Henry E. Brady et al., *Beyond SES: A Resource Model of Political Participation*, 89 AM. POL. SCI. REV. 271, 283 (1995). They also concluded that African-Americans readily participate in other political activities where available time and ability to do so are much more important determinants than wealth. Henry E. Brady et al., *Race, Ethnicity, and Political Participation in* CLASSIFYING BY RACE, *supra*, at 361-62. The study's conclusions are also borne out by comparing recent voting rates with rates of monetary contribution. While people of color gave about one percent of political contributions, they

10. *Available at* www.census.gov/hhes/www/income.html

voted at approximately the same rate as Whites. In the November 2000 elections, for example, 53.5% of Blacks reported voting and 56.4% of Whites reported voting. U.S. CENSUS BUREAU, TABLE 2. REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE, FOR THE UNITED STATES: NOVEMBER 2000 (2002).[11]

B. Soft Money Largely Forecloses Political Access To Racial Minorities.

In the days leading up to the Bipartisan Campaign Reform Act taking effect on November 6, 2002, the national political parties were tallying up a record-breaking amount of soft money raised—almost half a billion dollars. COMMON CAUSE, *The Soft Money Finale!* (Apr. 7, 2003).[12] The influence of soft money has become pervasive in political fundraising and parties have become increasingly dependent on it. In the 1992 election cycle, the two parties expended $86.1 million in soft money. BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, *The Purposes and Beneficiaries of Party "Soft Money"*: Summary of Key Findings at Figure One (2001).[13] This amount roughly tripled in the 1996 election cycle to $264 million, and then climbed to nearly $490 million in the 2000 election cycle. *Id.* According to FEC statistics, soft money constituted 17% of all campaign funds expended in 1992 by the Republican and Democratic parties, 30% in 1996 and 41% in 2000. *See* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, *supra*, at Figure One.

11. *Available at* www.census.gov/population/www/socdemo/voting.html.

12. *Available at* www.commoncause.org/publications.

13. *Available at* www.brennancenter.org/resources/downloads/purposes_beneficiaries070301.pdf

The rise of soft money in American elections has tended to concentrate influence among the biggest donors. In the 2000 election cycle, nearly two-thirds of soft money—about $296 million—came from just 800 donors. David Rogers, *"Soft Money" Study Shows Concentration Of Donations by Wealthy Contributors*, WALL ST. J., Mar. 16, 2001, at A16. Business interests and very wealthy individuals are the biggest soft money donors, accounting for nearly all of the growth since 1994.[14] COMMON CAUSE, SOFT MONEY LAUNDROMAT (2003).[15] Groups seeking to promote a social agenda, on the other hand, such as civil rights or environmental protection, are not major contributors of party soft money. Reports filed with the FEC demonstrate that between the 1994 and 1998 election cycles, the top industry soft money donors who increased their donations were insurance (298%), tobacco (255%), transportation (255%), telecommunications (233%), pharmaceuticals (207%), real estate (185%), and securities and investments (134%). COMMON CAUSE, *Wag The Dollar* (1998).[16] During the 2002

14. "People of color are also less likely to control business interests, which accounted for $208 million (eighty-one percent) of the 'soft money' contributions made in 1999 and the first half of 2000. As of the mid-1990s, minorities represented only three percent of senior managers of Fortune 1000 companies and only four percent of directors serving on corporate boards. Indeed, prior to 1999, no African American had ever served as a chief executive officer of a Fortune 500 Company." Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987, 1011 (2002) (footnotes omitted).

15. *Available at* www.commoncause.org/laundromat/stat/top50.htm.

16. *Available at* www.commoncause.org/publications/wagthedollar.htm.

election cycle, the pharmaceutical industry further increased its soft money donations by 29.8% from the 2000 cycle, while banks and lenders increased their soft money donations by 18.5%. COMMON CAUSE, *THE SOFT MONEY FINALE!*, *supra*.

Soft money donors use money to influence legislation. The first 18 months of the 1998 election cycle is instructive. The insurance, securities and investments, and oil and gas industries were the top industry soft money contributors to the Republican national party committees while lawyers and lobbyists, securities and investments, and labor unions were the top industry soft money donors to Democratic national party committees. COMMON CAUSE, *Wag the Dollar*, *supra*. During this same time period, Congress was debating legislation pertaining to oil royalties, bankruptcy reform, financial services reform, patient rights, and computers and antitrust. *Id.*

Communities of color are well aware that they are financially out-leveraged in the political process. According to a study conducted by the Greenlining Institute, while voters of all backgrounds believe that elected officials are beholden to large donors, people of color in particular perceive that low-income people are effectively shut out of politics and unable to influence legislative decisionmaking. THE GREENLINING INSTITUTE, CAMPAIGN FINANCE AS A CIVIL RIGHTS ISSUE: FINDINGS FROM EIGHT FOCUS GROUPS CONDUCTED AMONG CALIFORNIA VOTERS IN MARCH 2002 (2002) *on file with* The Greenlining Institute. This same study shows that African-American voters believe that money in politics is used to directly exclude their community from having any meaningful power in the political system.[17] The state has a

17. Lake Snell Perry & Associates conducted eight focus groups stratified by race and gender at three sites. Each group was comprised of eight to ten registered voters aged 20-65.

compelling interest in preventing this appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office: "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial corporations." *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (*per curiam*).

This compelling governmental interest in assuring the electoral system's legitimacy and protecting it from the appearance and reality of corruption is a "constitutionally sufficient justification" for governmental action—namely financial contribution limits—that may have the effect of curtailing First Amendment rights. *Id.* at 29 ("the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms"); *see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 386-88 (2000) (holding that state limit on contributions to state political candidates was sufficiently tailored to prevent corruption and appearance of corruption, as required to survive First Amendment scrutiny); *California Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182 (1981) (holding that limits on contributions to multi-candidate political committees do not infringe upon a contributor's First Amendment rights). "Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982); *see Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985) (noting the Court's "deference to a congressional determination of the need for a

prophylactic rule where the evil of potential corruption had long been recognized").[18]

C. The Current Campaign Finance Regime Deprives Racial Minorities Of Adequate Representation.

The soft money system provides an avenue for access that is closed to the non-affluent and to nearly all communities of color. It also precludes essentially anyone other than the wealthy elite or with connections to the wealthy elite from running successfully for office. In this way too the pre-BCRA campaign finance regime harms racial minorities.

Minorities are significantly underrepresented in elected positions. In the current United States Senate, of the 100 Senators, there are only three people of color (3%), and there are no Latino or Black Senators. MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 108TH CONGRESS: A PROFILE, CRS Rep. No. RS21379, at 5 (May 8, 2003).[19] Historically, since Post Reconstruction, only two African-Americans (MILDRED L. AMER, CONGRESSIONAL

18. *Amici* are, of course, well aware that Congress increased the limits on regulated direct donations to soften the ban on soft money contributions. No doubt extremely wealthy donors will continue to contribute directly in greater numbers than the less affluent. Nonetheless, direct donations are *limited* and, because they are not filtered through national political parties, they attach to particular candidates. The ban on unregulated and unlimited individual and corporate soft money donations is a major step forward in representative democracy; and the balancing Congress and the President achieved to make this important step is squarely within their discretion.

19. *Available at* www.senate.gov/reference/resources/pdf/RS21379.pdf

RESEARCH SERVICE, BLACK MEMBERS OF THE UNITED STATES CONGRESS: 1789-2001, CRS Rep. No. RL30378, at 35 (2001))[20]; three Latinos; three American Indians; and five Asian-American/Pacific Islanders have served in the United States Senate.[21] In the United States House of Representatives, 71 of 440 Members (16%) are people of color: there are two American Indian Members, five Asian-American/Pacific Islander Members (including one Delegate), 25 Latino Members (including one Delegate), and 39 Black Members (including two Delegates). MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 108TH CONGRESS: A PROFILE, *supra*, at 1, 5. Yet, people of color comprise approximately 31% of the population. *See* U.S. CENSUS BUREAU, PROJECTIONS OF THE TOTAL RESIDENT POPULATION BY 5-YEAR AGE GROUPS, RACE, AND HISPANIC ORIGIN WITH SPECIAL AGE CATEGORIES: MIDDLE SERIES, 2001 TO 2005 (2000).[22]

Soft money contributions help to perpetuate this disparity. The money generated by these unregulated donations is distributed to incumbents first. Declaration of Senator John McCain in Support of Defendants in *McConnell v. FEC* in the U.S. District Court for the District of Columbia, dated October 4, 2002, ¶22. Today, almost nine out of ten congressional incumbents seeking reelection are successful. JAMIN B. RASKIN & JOHN BONIFAZ, THE WEALTH PRIMARY: CAMPAIGN FUNDRAISING AND THE CONSTITUTION 19 (1994).

20. *Available at* www.senate.gov/reference/resources/pdf/RL30378.pdf.

21. *Available at* www.senate.gov/artandhistory/history/common/briefing/ minority_senators.htm.

22. *Available at* www.census.gov/population/www/projections/natsum.html.

With soft money contributions, incumbents are able to bankroll their campaigns. The more a candidate spends, the more likely she will win. In 1996, for example, 92% of the House races and 88% of the Senate races were won by the candidate who ran the most expensive campaign. PUBLIC CAMPAIGN, THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE, *supra*, Executive Summary.

CONCLUSION

Over 100 years ago, this Court recognized that the right to full and fair representation in a democracy is a fundamental right because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The current campaign finance regime has undermined the meaning of equal voting rights by elevating the interests of contributors over average citizens. Major leaders of both parties and the President successfully engineered a difficult but major step in the right direction with the Bipartisan Campaign Reform Act. *Amici* believe that the Act moves forward aggressively to provide an opportunity for much greater participation by communities of color in the election process. It is well within Congress'

and the President's power to regulate elections and prevent corruption or the appearance of corruption. We urge that it be sustained.

Respectfully submitted,

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